



REPUBLIC OF KENYA

High Court at Eldoret

Miscellaneous Civil Application 17 of 2004

THOMAS KIMARU MUGE.....EX-PARTE /RESPONDENT

VERSUS

KABSABET DIVISION LAND DISPUTES TRIBUNAL.....DEFENDANT

AND

MATHEW KIPKEMBOI CHIRCHIR.....INTERESTED PARTY/APPLICANT

RULING

By a Notice Motion dated 6th September 2004 brought under provisions of Order XVI Rule 5(d) and Section 3A of the Civil Procedure Act the Interested Party herein has applied for the following orders:

1. That the Application dated 2/2/04 be dismissed for want of prosecution;
2. That the Ex-parte order of stay issued by this Honourable court on 16/6/2004 be vacated;
3. That the costs of this Application be provided for.

The Application is premised on the grounds that ex-parte Applicant has failed to prosecute its Application and has not served the Interested Party or the Kapsabet Division Lands Disputes Tribunal. That it is now more than 8 months since that exparte Applicants obtained the ex-parte order yet the exparte Applicants are not willing to prosecute the Application. That the ex-parte Applicants are using the order against the Interested Party

to suffer injustice.

There is an affidavit in support of the Application sworn by Mathew Kipkemboi Chirchir dated 1st September 2004. He deponed that the Respondent has filed an Application for Judicial review on 6/2/04 and the Application was fixed for hearing on 2/3/04 however on this date the matter was not listed. That the Respondent is not interested in pursuing the said Application because of the existence of an order against him. That in the interest of justice litigation should come to an end.

There is a replying affidavit sworn by Ledishah J.K Kitonny, Advocate for the ex-parte Applicant dated 10th November 2004.

She stated that upon instructions she filed Miscellaneous Application No. 5 of 2004 and obtained orders on the 16/1/2004. That he filed the substantive motion on the 5/2/2004 and it was scheduled for hearing on 2/3/2004. That she gave the Application to a process server to effect service on the Interested Party. That the matter was not listed on 2/3/2004 and she fixed it for hearing on 23/6/2004. That before this date the Interested Party filed his Application dated 2/3/2004 which was fixed for hearing on 7/4/2004. That the Application was later fixed for hearing on 12/7/2004 but it was not listed. That on the 16/7/2004 she personally went to the Civil Registry where she was advised that she could not get a date because the court diary was full and they were waiting for authority over the new year diary.

Counsel for the parties presented their oral arguments on the Court.

Learned Counsel Mr. Kitur for the Interested Party/Applicant in his submission conceded that there is no provision for dismissal for want of prosecution and that Order XVI does not apply to judicial review proceedings. He submitted that he will only pursue prayer 2 of the Application. He argued that the ex-parte Applicant got an order on 16.1.2004 but service was not effected on the Interested Party to date in contravention of Order 53. That the Applicant is enjoying stay orders from January 2004 for over 2 years. He argued the court to exercise its discretion and vacate the stay order.

Learned counsel Mrs. Kittony for the Ex-Parte Applicant opposed the Application. She

submitted that section 3A of the Civil Procedure and the Rules are not applicable. Counsel in support of this argument cited the case of *Jotham Mulati Welamondi vs. Chairman of Electoral Commission of Kenya Misc. Civil Application No. 54 of 2002.*

She further argued that the vacation of the orders are not provided for in law. According to her all parties have been served. She argued that however in the event a party was not served under Order 53 Rule 4(4) gives power to the Court to order the parties to be served all the necessary parties.

Counsel submitted that the Applicant applied for injunction order on the 23.3.2004 which Application is still pending. That he was waiting for the Application for injunction to be concluded. That the stay orders will not interfere with the Applicant in possession of the land and using it. She prayed for the Application to be dismissed.

I have carefully considered the Application, the affidavits and the submission by counsel.

The Application herein contained two principal prayers. The first prayer has been abandoned. Counsel for the Applicant rightly conceded that the prayer under Order XVI or the Civil Procedure Rules was not applicable in judicial review proceedings. The second prayer is with regard to vacating the stay orders granted herein. The Applicant contended that the Ex-parte Applicant has not prosecuted the Application because he has in his favour stay orders which placed him in a position of comfort. That the Interested Party is prejudiced by the stay orders.

The stay order complained of was issued by this court on the 16/1/2004. The Notice of motion was filed on the 5th February 2004. As at the date of hearing this Application on the 27/6/2006 it was more than two and half years since the stay orders were issued. I agree that the Applicant has a right to be aggrieved.

The counsel for the Ex-parte Applicant has submitted that she has on several occasions tried to list the matter for hearing, but for whatever reason the matter the main motion has not been heard to date. Judicial review Applications are generally urgent Applications which should be dispensed with within reasonably short period of time. I am not convinced that for more that two years the court diary would not have accommodated the hearing of the main motion.

Counsel for the Ex-parte Applicant in his submissions argued that the issue of vacation of orders is not provided for under Order 53. Stay orders can be discharged by the court in exercise of its inherent powers. Stay orders are interlocutory orders of the court which can be vacated at the discretion of the Court.

However an order to vacate the stay herein may make the suit nugatory. I will in the circumstances I will order that the ex-parte Applicant shall fix the Notice of Motion dated 2nd February 2004 for hearing within 30 days from the date hereof. In default of compliance with this order the stay orders dated 16/1/2004 will stand discharged and vacated automatically.

Costs shall be borne by the Respondent in the Application. It is so ordered.

DATED AND SIGNED AT NAIROBI ON THIS 27TH DAY OF AUGUST 2012.

M. K. IBRAHIM

JUDGE

DATED AND DELIVERED AT ELDORET ON THIS 31ST DAY OF OCTOBER 2012

F. AZANGALALA

JUDGE

In the presence of: Ms Kipsei for Applicant

Mr. Ngumbi for Respondent

Mr. Maritim h/b for Mr. Katur for Interested Party